Cal Labor Code 1126: Any collective bargaining agreement between an employer and a labor organization shall be enforceable at law or in equity, and a breach of such collective bargaining agreement by *any party thereto* shall be subject to the same remedies, including injunctive relief, as are available on other contracts in the courts of this State.

PRIOR OPINIONS

The opinion sought to be reviewed is attached hereto in the appendix and reported on Lexis. The District Court opinion(s) are attached hereto in the Appendix.

JURISDICTION

Petitioner seeks this Court's review of the judgment entered on June 30th , 2005 by the United States Circuit Court of Appeals for the Ninth Circuit, by a Petition for Writ of Certiorari pursuant to the jurisdiction conferred by 28 U.S.C. Section 1254(1). This Petition is timely filed because it was mailed within ninety days of June 30th, 2005, the date a motion for rehearing was denied in the court below. Jurisdictional basis for the Ninth Circuit is 28 U.S.C. 1291, and for the District Court is 28 U.S.C. 1331 and 1337.

FACTS

Petitioners Charito Frias Hancock, a Filipina, was a cashier for WDW at the Disneyland Hotel 'Cast Café' for 11 years. In early 2001 shortly after H.E.R.E. (Hotel Employees and Restaurant Workers Union) and W.D.W. (Walt Disney World) renegotiated the instant CBA (Collective Bargaining Agreement), Employee Charito Hancock was commanded by the tacit authorization of a policy of the management at the Hotel 'NOT' to charge certain

culinary workers, certain managers and others, for food in her pivotal position as cashier, and 'TO' charge others.

Another part of this policy allowed culinary workers to receive their meal gratis, as long as it was out of sight of the other employees and approved by the chef/ restaurant manager. WDW's tacit authorization of a policy by Hotel 'management' was in effect the 'management's' (which includes the highest culinary authority at the Disneyland Hotel, Mr. Carlos Acosta, food and beverage chief who established the policy at a meeting of Cast Café workers) *imprimatur* and authorization to benefit culinary workers and select managers, and to receive their meal FREE in contravention of the CBA by over 58 employees, and others known to Petitioner's.

On or about May 1st 2001 Charito Hancock was suspended for an incident that involved a manager 'approved' meal, a vegetarian sandwich, which was authorized by Ismael Ordaz the WDW managing chef on her night shift. Ordaz gave Charito Hancock his card as proof of his authorization for the meal. Disneyland Security, by force of arms, wrongfully detained Petitioners on her way home and confiscated her property. She was held for several hours against her will . On May 17th 2001 Charito Hancock was wrongfully terminated by the employer Walt Disney World.[1]

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[1] H.E.R.E. has admitted that this aforesaid policy was in effect and stated so in the grievance they (Union) filed on May 18th 2001 and withdrew 12 days later on May 31st 2001 ie. that it was not any

Petitioner's independently and unilaterally pursued a grievance process as contractually permitted to employees in Article 26 of the Arbitration clause of the CBA.

On May 17th 2001 Petitioner's chose to pursue their rights pursuant to said instant CBA Article 26 grievance clause which states: ***Article 26 provides***

> *"Any employee who believes he or she has a specific justifiable request or complaint in regard ....interpretation of this Agreement shall discuss the same with his immediate supervisor with, or without a Union representative being ... ".*

Petitioner's *first* filed and served a written unilateral 'discussion' in writing to the manager Jamal Peoples. On May 24th 2001Petitioner's agreed to and were contractually permitted to hold a meeting with the supervisor Jamal Peoples, without the Union Rep. present and the issues were not settled within (5) working days as permitted in the CBA. At the meeting People's verbally *terminated* Petitioners.

One day later, May 18th 2001, HERE filed a *distinctly different* grievance *supra*. Petitioner's filed their contractually permitted Step 1 grievance **one day prior** to HERE because of a phone conversation between H.E.R.E. Rep. *Nelson Rivas* and Petitioner's on May 17th 2001-the last day to 'FEDEX' an official

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uncommon practice at the Disneyland Hotel for 'Cast Café' culinary workers to take food home.

filing under the CBA .[2]

With no settlement forthcoming within five days, Petitioner's unilaterally proceeded *towards* Step 2 Article 26 and reduced to writing and set forth the alleged violation, date, those involved and location. On June 5th 2001 Petitioner's timely filed and presented their unilateral grievance to WDW Labor Relations *Tom Fox* and *Vivian Williams*.

> ***Article 26 Step 2(a)*** *"... any complaint not resolved under Step 1 shall be reduced to writing, setting forth the alleged violation, date, those involved and location and presented to Human Resources/ Labor Relations.* ***Article 26 Step 1(b)*** *In case of discharge either party may unilaterally ... proceed directly to Step 2"*

Petitioner's formal written grievance entitled: "STEP 2 ARTICLE 26 NOTICE OF AGGREIVED CAST MEMBER CHARITO FRIAS"

The CBA Article 26 Step 2 requires a meeting regarding any grievance adjustment:

> ***Article 26 Step 2:*** *The* ***Employer*** *representative and the* ***Union*** *Business Representative shall meet within seven (7) working days to attempt to settle the same.*

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2 H.E.R.E. Rep. Rivas told Petitioner's that the filing did 'not' have to be made 'timely' stating that this was a practice 'commonly done' in his past employment disputes, and Rivas further stated 'Disney has an unwritten policy' to never run the letter of the time constraints (a policy repudiated by their motion to dismiss). Petitioner's pointedly disagreed with the Union *in writing* and, with an abundance of caution in case the Union did not file a 'timely' grievance, Petitioner's filed their grievance first as was their 'option'.

On May 30th 2001 HERE Rep. Rivas stated in a letter to Petitioner's ("... we are unable to process your grievance....", Rivas failed to specify *which* grievance. Charito Hancock unilaterally had proceeded to STEP 2 , and a separate grievance was yet pending before WDW labor relations people *Tom Fox* and *Vivian William* in accord with the contractual obligations of all the parties.

On June 8th 2001 WDW, Tom Fox (Labor Relations), corresponded to Petitioner's admitting WDW's receipt of their June 5th 2001 grievance, and by characterizing the *official grievance document entitled* **STEP 2 ARTICLE 26 NOTICE OF AGGREIVED CAST MEMBER CHARITO FRIAS** as a *'letter'* , repudiated Article 26 of the CBA and Petitioner's permitted contractual benefit to proceed to Step 2 *'unilaterally'*. Tom Fox stated:

> *"The Company is in receipt of your letter... "* and *"Based on the Union's withdrawal of the grievance on May 30th 2001, the Company considers the matter to be closed."* [3]

Through numerous phone conversations and written inquiries and demands requesting documents on the status of any investigations, the specific performance and legality of ARTICLE 26 of the CBA, a statement regarding the legality of the CBA ,

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[3] WDW's repudiated Petitioner's independent contractual right to pursue a 'unilateral' grievance , as a third party beneficiary of a unilateral contract. The current HERE administration quickly withdrew the grievance they had filed and abandoned any representation at that point and failed to arrange or attend any contractually required meeting pursuant to the pending 'employee filed' grievance.

rebuttals to statements of other cast café and WDW employees, HERE and WDW failed to produce. This vital information was withheld from Petitioners.

On or about June 22nd 2001, the day of the Union election of Ada Torres the current HERE President, in a phone call with her personally, Petitioners were assured from her that the new Union would 'investigate' and 'act' upon their claim. After numerous letters and phone calls from and to the Union post election, Petitioner was promised and induced to believe that the new regime was acting responsibly and rendering fair representation regarding Petitioner's grievance. In phone calls Ada Torres specifically stated that they were "looking at it, and investigating it further". The Union again proceeded in a similar perfunctory, discriminatory and bad faith manner .Petitioner's were tricked and induced to believe that the Union would either rescind their withdrawal of the grievance filed by Nelson Rivas, advise them about Petitioner's unilateral grievance, or advise regarding the contractual obligations and procedure. They failed to do either.

Nothing happened until September 17th 2001, Upon Petitioner's demands HERE replied in a letter stating that 1) the Company had paid all sums owed (which was admitted by WDW as false) , 2) All interviews and grievance procedures were fully executed (HERE never disclosed the status of the pending unilateral grievance) and 3) That HERE could **"...no longer continue with your grievance"** . Furthermore this letter referred to no other action taken nor dates of any action taken by the

Union. To the Petitioners, this was the last communiqué from HERE.

Petitioner's, exercising reasonable due diligence, interpreted this September 17th 2001 letter as HERE's *definitive* admission that they would make no statement as to the legality or specific performance of ARTICLE 26 of the CBA and the exercise of Petitioner's independent and unilateral third party beneficiariship therein , nor advise of any 'procedure' for unilateral filings by employees, if any, as Petitioner's strenuously requested verbally and in writing, *nor* would HERE take any action on Petitioner's *pending* grievance. HERE's written admission that Petitioner's grievance process was in effect 'continuing' is HERE's unequivocal endorsement that, according to HERE, the grievance matter was not finalized until that moment, September 17th 2001. **Six months later Petitioner's brought suit in a timely manner.**

ARGUMENT

1. Is a California Citizen's State and Federal Constitutionally protected status to be a unilateral third party contractual beneficiary, by an unambiguous and exclusive reservation of rights, preempted by federal labor law ?

Petitioners contend that their state law contract claims are not preempted under Section 301 of the LMRA. Petitioner's alleged a separate state law tort cause of action for breach of contract (the Fifth and Tenth Cause in their amended complaint).

Petitioner's *pro se* advocated that the unilateral contract did not arise from the CBA or federal law, but from the pre-existing state right to be a third party beneficiary.[4] There is ample evidence of the formation of an independent contract between Petitioners and HERE and Petitioners and WDW based on the self defining term 'unilateral'; it *is* a third party beneficiary, a unilateral contract, an express reservation of Petitioner's rights, and self- defined, *not* a CBA. Petitioner's unilateral right pre-existed as a separate and independent state and federal right to 'be' a third party beneficiary. The Ninth Circuit panel incorrectly applied the *Lingle* 'interpretation' standard in this case. The *Lingle* court explained that a plaintiff could maintain an independent state claim even if it involved the same contractual considerations under the CBA, see

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[4] *see California Constitution Article 1 Declaration of Rights SEC. 9* stating unequivocally: "A bill of attainder, ex post facto law, **or law impairing the obligation of contracts may not be passed.**"

United States Constitution Section. 10.

Clause 1: No State shall ..... pass any ..... Law impairing the Obligation of Contracts.....

Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 , 108 S.Ct. 1877 at 1883. [5]

The language of section 301 does not sweep so broadly as to preempt all claims based on a mere reading of a CBA. Petitioner's relied on *Caterpillar v. Williams* , which noted that:

> ".....individual employment contracts are not inevitably superseded by any subsequent collective agreement covering an individual employee, and claims based upon them may arise under state law. Caterpillar's basic error is its failure to recognize that a plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract relied upon is *not* a collective-bargaining agreement."
>
> 482 U.S. at 396, 107 S. Ct. at 2431, 96 L. Ed. 2d at 329-30.

In the present case the collateral contract has been shown to be unilateral and implied from conduct including an implied covenant of good faith and fair dealing that the Union and the Company would not ignore the right of Petitioners to receive the benefits of the Agreement, and therefore, "it is unclear whether an

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[5] Respondents contend that the Petitioner's suit is preempted because the 'contract' is one which arises out of the collective bargaining process and any claim arising therefrom is preempted by the union's duty of fair representation and Petitioner's must exhaust administrative remedies.

examination of the collective-bargaining agreement is truly required by [state] law," because "'[i]n pleading a cause of action on an agreement implied from conduct, only the facts from which the promise is implied must be alleged.'" *Caterpillar*, 482 U.S. at 395 n.9, 107 S. Ct. at 2431 n.9, 96 L. Ed. 2d at 329 n.9 (quoting *Youngman v. Nevada Irrigation Dist.*, 449 P.2d 462, 466 (Cal. 1969)).

In the case at bar, Respondents negotiated, formulated, *agreed* and accepted the terms of instant CBA, and Petitioner's independent benefit manifested within the state of California. Petitioner's contractual benefit to proceed unilaterally is therefore enforceable at law and in equity in the Courts of the State of *California under Cal. Labor Code 1126*[6]. *In Miller v. ATT Network Sys., 850 F2d 543, 547 (9th Cir 1988)* the Ninth Circuit recognized that " public policy supporting uniform interpretation of contract terms does not prohibit states from establishing different

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[6] *Cal Labor Code 1126:* Any collective bargaining agreement between an employer and a labor organization shall be enforceable at law or in equity, and a breach of such collective bargaining agreement by *any party thereto* shall be subject to the same remedies, including injunctive relief, as are available on other contracts in the courts of this State.

labor regulations" and that Section 301 of the LMRA "does not preempt state laws that alter the 'substance of what private parties may agree to in a labor contract." Quoting *Allis-Chalmers, 471 U.S. at 211.* It is a claim's legal character, as independent of rights under the CBA that decides whether a state cause of action may go forward. *Lingle,* 486 U. S., at 413, n. 12; *Livadas v. Bradshaw*, 512 U.S. 107 (1994). In this case, the primary text for deciding whether Petitioners are entitled specific performance of their third party contract is not the collective bargaining agreement, but a *dictionary.* (See *Livadas v. Bradshaw (reference to a calendar)* [7] In *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683 (9th Cir. 2001) (en banc), *cert. denied,* 122 S.Ct. 806 (2002), the Ninth Circuit corrected and clarified that to the " ... extent our prior cases held or implied that preemption was proper because of the *mere possibility that the subject matter* of the claim was a proper subject of the collective bargaining process, held such statements to be an

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[7] There is no dispute about the CBA's meaning. "[W]hen the meaning of contract terms is *not* the subject of dispute, the bare fact that a [CBA] will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." `Livadas v. Bradshaw S Ct.` at 2078.

incorrect articulation of § 301 preemption principles."

Petitioner's third party beneficiary delineates the obligations of Respondents, in a contractual relationship with individual employees as, a unilateral option, *to proceed*. The legal effect of individual employees 'proceeding' crafts a hypothetically speculative conclusion as to the result, if any, [8] which eliminates the defenses Respondents can proffer in attempting to intertwine Petitioner's unilateral contract with the CBA; see *Cramer supra*; "it would be inconsistent with congressional intent under [301] to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." *Allis-Chalmers Corp., supra*, at 212.

The inconsistency is three-fold. First, Petitioner's exclusive reservation of rights (unilaterally) is not waivable. Second, "waiver" is not a question of the meaning of the CBA. The standard for waiver of protected rights, under both federal and state law, is whether the rights have been clearly,

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[8] A CBA's provision does not trigger preemption when it is only *potentially* relevant to the state law claims. *See Humble v. Boeing Company*, (No. 01-35107, Ninth Circuit Court of Appeals, September 18, 2002).

unequivocally and knowingly surrendered. Third, even if waiver were simply a question of the meaning of the CBA, that does not mean that Respondent's bare assertion of "waiver" automatically preempts Petitioner's tort claims. Petitioner's tort claims are barred only if there has been a waiver. In *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683 (9th Cir. 2001) (en banc), *cert. denied*, 122 S.Ct. 806 (2002) the Ninth Circuit reaffirmed the rule that a mere possible reliance on a CBA provision does *not* suffice to trigger preemption; at the very least, the fact that a need to interpret the CBA is only hypothetical seriously undercuts a defendant's argument that the state law claim "substantially depends" on the terms of the CBA. [9] Instant case thus presents the question whether the Ninth Circuit panel's ruling serves to atomize a state citizens PRE-EXISTING 'contract' causes of action that manifest through an express reservation of rights and by a unilateral contract in a CBA, thus violating protections that California has

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[9] An intent to subject third-party beneficiaries to arbitration is not presumed; it must appear from "the language of the contract, or the circumstances under which it was executed." *See Schneider Moving & Storage Co.* v. *Robbins*, 466 U.S. 364, 371 (1984).

promulgated to protect its citizen's labor and contractual relationships.

In Sprague v. General Motors Corporation 133 F3rd 388 at 389 (6th Cir 1998), the Sixth Circuit Court of appeals upheld an unambiguous express reservation of rights by an employer (General Motors) to 'unilaterally' amend a health benefit plan that had been a part of a CBA. In the instant case Petitioner's possessed and perfected with service, an express reservation of rights permitting a unilateral contractual act by Petitioners as third party beneficiaries, in written form, to clarify the playing field and legally challenge that portion of their Contract/ CBA potentially involving Petitioner's unilateral state and federally protected contract rights. [10] In the distinct and separate unilateral grievance perfected by Petitioners, clear allegations were made that the 'Agreement' was

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[10] A CBA's provision does not trigger preemption when it is only *potentially* relevant to the state law claims, without any guarantee that interpretation or direct reliance on the CBA terms will occur. This Ninth Circuit in *Gregory v. SCIE, LLC.*, (No. 01-57241, Ninth Circuit, January 27, 2003), held that *Gregory's* claim was based entirely on state law and there was no dispute over the terms of the CBA or its interpretation. The issue was not *how* overtime rates were calculated but whether the *result* of the calculation complied with California law.

being operated by the parties with unclean hands and intentions and was "coercively adopted".

Respondents did not acknowledge Petitiner's 'unilateral' claims existence **until 27 MONTHS after the fact** in their Reply Brief before the Ninth Circuit Court of Appeals Panel. Petitioners are NOT signatories to the contract, they are third party beneficiaries.

The Ninth Circuit in *Cramer supra* explained : The plaintiff's claim [11] is the touchstone for the preemption analysis, and "the need to interpret the CBA must inhere in the nature of the plaintiff's claim" to trigger preemption. *Cramer* asserts "....Defensive reliance on the terms of the CBA, mere consultation of the CBA's terms, or a speculative reliance on the CBA will not suffice to preempt a state law claim."

As true in the case at bar, *Livadas supra* , held that the plaintiff's claim was "entirely independent of any understanding

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11 Since the promise made to Petitioners is unmistakably explicit as, a unilateral contract, Respondents cannot rely on their duties under the CBA which conflict with the promises they had made directly to the Petitioners . In mounting any defense to Appellant's state law breach of contract claims see *Anderson v. Ford Motor Co.*, 803 F.2d 953 at p. 958, citing *Belknap, Inc. v. Hale* (1983) 463 U.S. 491.

embodied in the CBA between the union and the employer." *Id.* at 124-25, and even though the Court looked to the CBA to determine the *absence* of a waiver of state law protections, it concluded that preemption was not required. See *id.* at 125.

In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), the Court ruled that the mere fact that an employer has entered into a CBA governing its employees' *terms* and conditions of employment, as here, does not immunize the employer from claims seeking to enforce state law rights that are independent of any right established by contract. *Allis-Chalmers Corp.* 471 U.S. at 212. Section 301 did not "give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored." *Id.* Nor must the state claim be completely unrelated to the CBA; it must only be "sufficiently independent of the CBA to withstand the pre-emptive force of § 301." *IBEW v. Hechler*, 481 U.S. 851, 859 (1987).

In a direct and square **CONFLICT** with the Panel, The *Lingle* Court went on to observe that it was possible for a state law claim to require some reference to a CBA without being preempted:

> [A]s a general proposition, a state-law claim may depend for its resolution upon both the interpretation of a CBA and a separate state-law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the state law analysis would not thereby be preempted.

Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 at 413 n.12. In *Hawaiian Airlines v. Norris*, 114 S. Ct. 2239 (1994), the Supreme Court held that the state law claims were not preempted, because the standard for preemption under the RLA is identical to the standard for preemption under the LMRA as articulated in *Lingle*. In this regard, the Court specifically rejected the employer's contention, based on *Conrail v. RLEA*, 491 U.S. 299 (1989), that a state law claim is preempted when the employer's action is "arguably justified" by a provision in the CBA. *Id.* at 2250. [12]

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[12] As the Court explained in *Hawaiian Airlines*, the fact that a defense of 'arguable justification' under the CBA may serve to distinguish between major and minor disputes under the RLA does not mean that the same test determines "the threshold question whether the dispute was subject to the RLA in the first place." *Id.* at 2251.

ARTICLE 26 STEP 1 AND 2 ARE UNAMBIGUOUS

Plaintiff was entitled to present a written *unilateral* grievance and defendants are bound by contract to "meet", to "attempt to settle", to "reduce to writing" and "forward" an "answer" relevant to their "attempt to settle" to grievant. On its face, the contract 'language' supports Petitoner's actions and interpretation and any reasonable person could not find the contract's terms to be ambiguous. *Castaneda v. Dura-Vent Corp., 648 F.2d 612, 619 (9th Cir. 1981).* ***Article 26 STEP ONE of the CBA states in part:***

> **"If the issue is not settled within five (5) working days after its presentation to the supervisor, the employee or the union representative may proceed to Step 2 of the grievance Procedure within seven (7) working days .**
>
> **b. In case of discharge either party may unilaterally waive Step (1) and proceed directly to Step 2"** ***(underline added)***

Article 26 STEP TWO of the CBA states:

> **"Upon invocation of Step 2, any complaint not resolved under Step 1 shall be reduced to writing setting forth the alleged violation , date, those involved and location and presented to Human**

Resources /labor Relations . The employer representative and the Union Business representative shall meet in seven working days to attempt to settle the same. The answer to a grievance shall be reduced to writing and forwarded to the greivant's representative within seven (7) working days after the parties have met.

International Union v. Yard-Man, Inc., 716 F.2d 1476 (6th Cir. 1983), provided a framework for interpreting the provisions of a CBA. Many of the basic principles of contractual interpretation are fully appropriate for discerning the parties' intent in collective bargaining agreements. The court should first look to the explicit language of the CBA for clear manifestations of intent.

Step One textually juxtaposes the employee and the union on a specifically articulated and identical dispositional plane ie. **"the employee or the union representative".** This express intent of the drafters clarifies that both parties have an equal opportunity for proceeding to Step 2. The drafter's intent manifests three times: 1) as shown above; 2) **"In case of discharge either party ...."**; 3) **".....either party may unilaterally waive Step 1 and proceed directly to Step 2."**

The intended meaning of even the most explicit language can, of course, only be understood in light of the context which

gave rise to its inclusion. The plain language of **Step One** purports the term unilateral.[13] The preponderance of evidence proves **STEP ONE** to be an unambiguous clause that entitled Plaintiff Charito Hancock to proceed to **STEP 2**. The law of the shop cannot be relied upon to modify clear and unambiguous provisions . *Tootsie Roll Indus., Inc. v. Local Union # 1 832 F.2d 81 at 84 (7th Cir. 1987).*

The court should also interpret each provision in question as part of the integrated whole. **STEP 2** purports that Plaintiff's grievance shall be reduced to writing and presented to Human Resources / Labor Relations. **STEP 2** commands WDW and HERE shall adjourn a meeting regarding Plaintiff's written grievance to "**attempt to settle**" it. Step 2 mandates that : "**The answer to a grievance shall be reduced to writing and forwarded to the greivant's representative....**".

If possible, each provision should be construed consistently with the entire document and the relative positions and purposes of the parties. **Step One** entitles Plaintiff to proceed

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[13] Unilateral --- One-sided, ex parte: having relation of only one of two or more persons or things. *Black's Law Dictionary (5th Ed.)*

to **STEP 2** unilaterally and is fully consistent with **STEP TWO** in that the **STEP 2** 'gateway' requires only an invocation of STEP 2. The relative position of Charito Hancock is clear, she is an employee entitled under **STEP ONE** to proceed to "**invoke**" **STEP 2** and present a written grievance to WDW. **HERE** and **WDW** have mutually contracted to "**meet**" within seven working days and attempt to settle her written grievance which was drafted by Plaintiff specific to her State Contract rights and demanding redress of the same . [14]

Where ambiguities exist, the court may look to other words and phrases in the collective bargaining agreement for guidance. *Step Two* reiterates the meeting requirement (twice), specifying "**The employer representative and the Union Business representative shall meet**" and that the written answer shall be forwarded "....**within seven (7) working days after the parties have met.**"

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[14] Variations in language used in other durational provisions of the agreement may, for example, provide inferences of intent useful in clarifying a provision whose intended duration is ambiguous. For example, as in all contracts, the collective bargaining agreement's terms must be construed so as to render none nugatory and avoid illusory promises.

The plain language of Step One and Two does not create illusory promises or a nugatory rendering interpretation. The term "**grievant's representative**" is distinguished from "**Union business representative**". Charito Hancock (or her lawyer) is entitled to be a recipient of the "**forwarded**" obligatory written "**answer**." *see* *Meeks v. Illinois Cent. Gulf R.R., 738 F.2d 748, 751 (6th Cir. 1984)* (setting aside board's award where board provided notice to union, but union failed to give notice to employee)

Finally, the court should review the interpretation ultimately derived from its examination of the language, context and other indicia of intent for consistency with federal labor policy. *In this case*, federal labor policy would not be *inconsistent* with the CBA . **STEP ONE** permits an employee to meet with the WDW management without a Union Representative present. Plaintiff did so May 24th 2001. If that doesn't settle it, the employee can proceed to invoke Step 2 with a written grievance

which, clearly shown by the record below, Petitioner's perfected service and filing in a timely manner.[15]

Defendants obligatory written "**answer**" relevant to Charito Hancock's unilateral **STEP TWO** grievance shall purport WDW and HERE's attempt to settle. The "**attempt to settle**" shall be "**reduced to writing**" and shall therefore be definitive of the **defendants** individual positions or stipulations.[16] HERE's May 30th 2001 'withdrawal' letter was absent explanation, or allegation of investigation of Plaintiff's unilateral grievance, nor was there reference *to* the unilateral grievance therein. Absent explanation, the Union's representation can be assumed to be an arbitrary ministerial act. *Peters v. Burlington N.R.R., 931 F.2d 534, 540-41 (9th Cir.1990).*

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[15] **STEP 2** is consistent with Federal Labor Law in that an employee is not excluded from, but contractually entitled to, **invoke** her complaint in writing (*or a lawyer could write it for her*) and present it to the Labor Relations and Human Resource Department at WDW.

[16] WDW is contractually obligated to define their position or stipulation in writing. HERE has an identical obligation. Under *29 USC 501(a)* HERE has a further obligation in their fiduciary duty of fair representation . HERE is mandated to definitively establish WDW's obligatory written position or stipulation relevant thereto . *29 USC 501(a) and the CBA* requires notification of WDW's written position or stipulation to the Union management, the grievant, and the bargaining unit at large when appropriate.

Both WDW and HERE contracted to forward a written answer of her State Law request for redress of grievance, ie. The status of the arbitrability of the arbitration clause itself to Petitioner which the Respondents failed to do. Instant CBA cannot be found to have denigrated or contradicted basic federal labor law .*Yard-Man. at 1479-80*

SECOND QUESTION (Alternatively)

2. Does an employees' execution of a clearly independent and delineated State Contract tort Claim, independent and expressly reserved as such as an independent contractual procedure of an arbitration process to a collective bargaining agreement, require the UNION to explain the CBA's procedure to employees even if the explanation is abhorrent to the interests of the Union, and if the Union fails to do so, has the Union breached it's Duty of Fair Representation ?

The Circuit Courts of Appeal Are Split In Their Interpretation Of This Important Precedent .

This Court has clearly mandated a standardized jurisprudence with respect to Labor cases. The Court judicially determined the Unions duty of fair representation in *Vaca v Sipes 386 U.S. 171 (1967).* This Court in *Del Costello v International Bhd of Teamsters, 462 U.S. 151 (1983)* truncated the statute to standardize the time to file a lawsuit of claims against the Union's breach of their duty of representation. In the instant case the Union failed to explain the

grievance procedures in it's CBA to Petitioner until a lawsuit was brought and taken to appeal with the Ninth Circuit and both the Union (HERE) and Disney (WDW) were compelled to **27 months later**. Respondent's forthcoming 'explanations' were bald and hollow and served as admissions of their wrongdoing while all the time attempting to create a false illusion of ambiguity.

Petitioners can establish material facts that makes a prima fascia showing of HERE's ignorance of the grievance procedures in their own CBA. Defendant HERE acknowledged Charito Hancock's unilateral grievance under oath. HERE's tardy recognition came for the *first time* on appeal 27 months after WDW discharged Charito; HERE stated : "... only the Union was entitled to pursue a grievance to further steps of the procedure" , (*referring to Article 26 Step 2 in instant case*). This admission is an *ipso facto* stipulation that HERE ignored the plain language of STEP 1 and 2 of the CBA and Plaintiff's grievance.

HERE asserted the unilateral action of filing a grievance, **was not**, as cited by them on August 8th 2003 in their Appellate Reply Brief , "....*an action available to Plaintiff.* "

Unions should be responsible under their duty of fair representation to explain, not misrepresent by silence, the terms of the collective bargaining agreement even if it contains a provision that expressly guarantees rights under state law and is abhorrent to their own CBA interests as Petitioners contend. [17]

Arbitrariness in the context of HERE's negotiations[18] is clear by the record and the text of the CBA ; "a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' *Ford Motor Co. v.*

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[17] Where the union processes the grievance in a careless manner; or the union inadequately handles the grievance because it is ignorant of contract provisions having bearing on the case, a breach of the duty of fair representation can be found. *Ryan v. General Motors Corp., 929 F.2d 1105, 1109 (6th Cir. 1989).* A union acts arbitrarily, and breaches its DFR, when its decision not to pursue a grievance is made without a rational basis; *Wills v. Walt Disney Pictures & TV, Inc.*, No. 97-55420 (9th Cir. 1998) (30 year employee not fairly represented because the 'Union' did not 'know' if he was still a member) *citing Vaca v. Sipes*, 386 U.S. 171, 190, 17 L. Ed. 2d 842, 87 S. Ct. 903 (1967); *Stevens v. Moore Business Forms, Inc* 18 F.3d 1443 at 1447 (9th Cir. 1994).

[18] The duty of fair representation unquestionably attaches to contract negotiations by a union. In the lawyer's work product that formulated the instant CBA by HERE , the tripartite standard announced in *Vaca v. Sipes*, 386 U.S. 171, 190 (1967) applied to HERE in its negotiating capacity.

Huffman, 345 U.S. 330, 338 (1953), as to be wholly irrational or arbitrary.

The Ninth Circuit Panel, by affirming the District Court's decision, imposes a liberal standard for conduct of Unions that relieves the Unions within the Ninth Circuit jurisdiction of the duty to explain and properly represent procedures available (including employee's independent contractual rights) to employees in a Collective Bargaining Agreement universe. The result is incongruous given the Sixth Circuit's decision in *Farmer v. ARA Servs., Inc., 660 F.2d 1096, 1103-04 (6th Cir. 1981)*. As in *Farmer*, H.E.R.E.'s CBA was ratified by the rank and file by vote. Petitioner's contend H.E.R.E. had a similar duty to explain the agreement to the rank and file (including employee Charito Hancock) which the record shows they failed to do even after numerous written requests from Petitioner. The Eighth Circuit in *Anderson v. United Paperworkers, 641 F.2d 574, 577 & 578 n.2, (8th Cir. 1981)* .noted that A union may not misrepresent to union members the terms of their CBA. Concealing procedures throughout a process equates as clear bad faith misrepresentation. Employees who have a reasonable belief that they have an

expressly reserved rights are in need of protection against retaliation by Union's who's CBA interests conflict with the independent State tort remedies of employees . The purpose of *Vaca* and the duty of fair representation is to give assurances to employees who may be rightfully proceeding as contractually permitted, albeit within a CBA framework, but unilaterally and separate there from, will not have action taken against them simply for engaging in such activity. [19]

Equitable estoppel, then, may come into play "if the defendant takes active steps to prevent the plaintiff from suing in time" -- a situation that the Seventh Circuit terms "fraudulent concealment." *Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450-51 (7th Cir. 1990)).*

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[19] The Respondent's actions in this case included misrepresentation by silence of the unilateral and express reservation of rights by both Respondents. The Ninth Circuit Court sanctioned such a departure from the accepted course of judicial proceedings as to call for an exercise of this Court's supervisory power. To avoid undercutting the purpose of *VACA* , a Union's breach of duty of fair representation must be construed to cover claims of employees who have a reasonable belief in contractual rights, even expressly reserved unilateral state contract rights as part of a CBA and a Union should be compelled to explain the CBA and should not withhold vital information notwithstanding the underlying abhorrent effect on the Union's 'legal' position and any claims that may accrue to an employee such as in the instant case.

In the September 17th 2001 letter from the President of the Union she still maintained the fraudulent concealment of the separate and PENDING unilateral grievance. Petitioners brought their lawsuit six months after receiving the letter which is well within the reasonable time standard under a request for equitable estoppel and is probative evidence of the timing of the knowledge of wrongdoing under the *Galindo v Stoody* 793 F2d 1502 (1986) due diligence standard. [20] *Retail Clerks Union Local 648, AFL-CIO v. Hub Pharmacy, Inc., 707 F.2d 1030 (1983), accord Jeanette Daviton v. Columbia / HCA/ Healthcare 241 F.3d 1131;2001(9th Cir 2000).*

CONCLUSION

For these reasons this Supreme Court should grant this writ and exercise it's judicial powers over a matter that affects literally thousands of workers and rises to the level of national importance requiring the guidance of this Court. This Honorable Court should grant certiorari and reverse the holding below.

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[20] To invoke an estoppel as a shield against a statute of limitations defense, a plaintiff "must show that he brought his action within a reasonable time after the facts giving rise to the estoppel have ceased to be operational. *Overall v. Estate of Klotz*, 52 F.3d 398, 404 (2d Cir. 1995) *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1324 (11th Cir. 1989)

Respectfully submitted;

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Certificate of Service and Filing

We, the undersigned, did file 40 copies of this **Petition for Writ of Certiorari** by Federal Express on NOVEMBER 30TH 2005 to the Supreme Court of The United States Washington DC, and we did US Postal Mail three copies each of the same to the defendant's counsel of record listed below on said date.

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED June 30th 2005 Cathy A. Catterson, Clerk
U.S. COURT OF APPEALS

No. 03-55143
D.C. No. CV-02-05206-PA
Central District of California,
Los Angeles

ORDER

CHARITO FRIAS HANCOCK; JOHN W. HANCOCK,
Plaintiffs-Appellants, v.

WALT DISNEY WORLD INCORPORATED, dba Disneyland Hotel; HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION LOCAL 681,
Defendants-Appellees.

Before: SCHROEDER, Chief Judge, PREGERSON and TROTT, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing. Chief Judge Schroeder and Judge Pregerson have voted to deny the petition for rehearing en banc and Judge Trott so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are

DENIED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED June 20th 2005 Cathy A. Catterson, CL
U.S. COURT OF APPEALS

No. 03-55143
D.C. No. CV-02-05206-PA

MEMORANDUM *

CHARITO FRIAS HANCOCK; JOHN W. HANCOCK,
Plaintiffs-Appellants, v.

WALT DISNEY WORLD INCORPORATED, dba Disneyland Hotel; HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION LOCAL 681,
Defendants-Appellees.

Appeal from the United States District Court for the Central District of California Percy Anderson, District Judge, Presiding

Submitted April 8, 2005 **
Pasadena, California

Before: SCHROEDER, Chief Judge, PREGERSON and

TROTT, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as

provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

Charito Frias Hancock and her husband, John Hancock ("plaintiffs") appeal pro se the district court's dismissal of their complaint against Walt Disney World Company and Hotel Employees and Restaurant Employees Union Local 681, as as the court's decision not to award sanctions against the defendants for violations of the local rules. We have jurisdiction under 28 U.S.C. Section 1291, and we affirm.

We review de novo a dismissal on statue of limitations grounds. Ventura Mobilehome Cmtys. Owners Ass'n v. City of San Buenaventura, 371 F.3d 1046, 1050 (9th Cir. 2004). We review for abuse of discretion a district court's decision not to retain supplemental jurisdiction over state claims. Brown v. Lucky Stores. Inc.. 246 F.3d 1182, 1187 (9th Cir. 1999). We review the district court's choice of sanctions for violation of local rules for abuse of discretion. Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3rd 1096,1106 (9th Cir. 1999).

Those claims arising under arising under Section 301 of the Labor

Management Relations Act are governed by the six-month statute of limitations of Section 10(b) of the National Labor Relations Act. DelCostello v. Teamsters, 462 U.S. 151,155 (1983). That six-month period began to run on June 8, 2001, when Mrs. Hancock received notice that the Union would not pursue her grievance and that Disney considered the matter closed. Zuniga v. United Can Co., 812 F.2d 443,448-49 (9th Cir. 1987) (concluding that the cause of action accrues when a union member learns that the union will not further pursue the member's grievance). Mrs. Hancock's further attempts to gain assistance from the Union do not alter this conclusion. See id. at 447-49 (holding that the action accrued when the member was informed that the union would no longer pursue the grievance even though subsequently an internal union appeal process was pursued). The filing of the claims under Section 301 of the Labor Management Relations Act on March 15, 2002, was therefore untimely and properly dismissed as time-barred.

Moreover, the district court properly found that the federal claims preempted those state law claims that "require(d) the interpretation of a collective bargaining agreement." Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399,413 (1988). Having correctly dismissed those claims without prejudice. See 28 U.S.C. Section 1367(c); Acri v. Varian Assoc., Inc., 114 F.3rd 999,1000 (9th Cir. 1997) (stating that district court should dismiss state law claims when all federal claims have been dismissed).

In addition, the district court did not err when it dismissed with prejudice the cause of action alleging falsification of records under the Employee Retirement Income Security Act, 29 U.S.C. Section 1141, and the Fair Labor Standards Act, 29 U.S.C. Section 211, because there is no private right of action for these federal claims.

Finally, the court did not abuse its discretion by decling to award sanctions for the defendants' violations of the local rules prohibiting ex parte communications. The court reprimanded the

defendants for their violation, and noted also that the violation had resulted in no harm to the plaintiffs. This decision was proper.

Plaintiff's contention regarding judicial bias is meritless, and the remaining contentions are also without merit.

AFFIRMED.

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UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 02-05206-PA(CWx) **Date: September 18, 2002**

Title: JOHN HANCOCK and CHARITO FRIAS HANCOCK –v-HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION LOCAL 681; WALT DISNEY WORLD COMPANY dba DISNEYLAND HOTEL

PRESIDING; HONORABLE PERCY ANDERSON, U.S. DISTRICT JUDGE

Jim Holmes **Sharon Seffens**
Courtroom Deputy **Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFF:
John Hancock, Pro Se
Jason A. Savlov, specially appearing for Charito Frias Hancock

ATTORNEYS PRESENT FOR DEFENDANTS:
J Thomas Bowen
Rachelle Singer

PROCEEDINGS: Defendant Hotel Employees and Restaurant Employees Union, Local 681, AFL-CIO's Motion to Dismiss and to Strike (filed 7/31/02)

Defendant Walt Disney World Co. dba Disneyland Hotel's Motion to dismiss, Pursuant to 12(b)(6), and Motion to Strike Portions of the Amended Complaint (filed 8-1-02)

Defendant Walt Disney World Co. dba Disneyland Hotel's Motion to Transfer Case to Southern Division (filed 9-9-02)

Court hears oral argument. The court orders the first, second, third, fourth and tenth claim dismissed with prejudice. The court dismisses the fifth, sixth, seventh, eighth and ninth causes of action without prejudice. The court declines to exercise its supplemental jurisdiction to the extent that they allege a state cause of action in the fifth, sixth, seventh, eighth and ninth claims of the complaint. Defendant Walt Disney's motion to transfer is moot.

IT IS SO ORDERED.

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CIVIL-GEN

Initials of Deputy Clerk: jh

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UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

AMENDED CIVIL MINUTES - GENERAL

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IT IS SO ORDERED.

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CIVIL-GEN

Initials of Deputy Clerk: jh

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